

CONSULTATION PAPER

Residential Tenancy Amendment Bill 2001

October 2001

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2. Background

The *Residential Tenancy Act 1997* and *Residential Tenancy Regulations 1997* came into effect on 1 July 1998 replacing the former *Landlord and Tenant Act 1935*.¹

During 1999 and 2000, a Post Implementation Review of the Residential Tenancy Act was conducted to determine:

- whether the Act is achieving its objectives;
- its impact on the residential tenancy market; and
- areas for administrative improvement arising from the above.

In November 2000, the Attorney-General the Hon. Dr Peter Patmore released the final report of the review which contained a range of recommendations for amendment to the Act. A copy of the final report can be obtained from:

- <http://www.justice.tas.gov.au/ca/review1.htm>;
- Office of Consumer Affairs and Fair Trading on 1300 65 44 99; or
- Consumer Affairs and Fair Trading at consumer.affairs@justice.tas.gov.au

A list of recommendations are attached at Appendix 1 of this document.

3. Purpose of this consultation paper

3.1 Residential Tenancy Amendment Bill 2001

The primary purpose of this consultation paper is to seek comment from key stakeholders and the public on the draft *Residential Tenancy Amendment Bill 2001* which has been developed from the recommendations of the Post Implementation Review of the Act, conducted during 1999 - 2000.

¹ The *Landlord and Tenant Act 1935* is still in force but no longer applies to residential tenancies.

Government has given in-principle support for the drafting of a Bill to reflect the report's recommendations. A draft Amendment Bill is attached at Appendix 2. Each recommendation is followed by a reference linking that recommendation to the relevant clauses of the draft Amendment Bill. Comment is sought on the draft Bill.

3.2 Further key issues

The second purpose of this paper is to seek comment on two key issues where further information and comment is needed before finalisation of the Amendment Bill. These two issues are:

- 1. Return of security deposits at the end a tenancy;*
- 2. Pet Bonds.*

These issues and a range of options are detailed in the '**Issues and options**' section below.

Comment should be addressed to:

Residential Tenancy Act Review
Consumer Affairs and Fair Trading
GPO Box 1244
HOBART TAS 7001; or
by email to consumer.affairs@justice.tas.gov.au

Comment should specifically address either the issues or the draft amendment Bill.

Verbal submissions are welcome and can be arranged by telephoning Chris Batt on (03) 6233 4512 or by email at: chris.batt@justice.tas.gov.au.

The **closing date** for submissions is:

30 November 2001.

4. *Issues and options*

Issue One: Return of security deposits at the end of a tenancy

Background:

Unlike a number of larger jurisdictions, the Residential Tenancy Act does not require security deposits to be lodged with an independent authority. This means that security deposits are held by property owners or their agents during the term of a tenancy and that disbursement at the end is a matter between the contracting parties.

If a dispute arises, a tenant may apply to the Residential Tenancy Commissioner requesting that the Commissioner arbitrate the dispute. Disputes invariably arise in relation to rent owing, damage or early termination. The Commissioner applies the rules of procedural fairness and a set of guidelines which set out principles relevant to tenancy disputes.²

The process takes about four weeks from the time of application to the time of decision.³ When an application is made, the Commissioner writes to an owner requiring the security deposit to be lodged with the Commissioner within 7 days. The Commissioner holds this money until a decision is made. Decisions are subject to appeal to the Magistrates Court (Small Claims Division) within 7 days of being made.

Generally, the process conducted by the Commissioner works well. The time taken to reach a decision and the costs of the process compares favourably with arbitration processes in other jurisdictions.

² The Residential Tenancy Guidelines were prepared for the Commissioner by the Tasmanian University Law School in consultation with the Tenant's Union and the Real Estate Institute.

³ This is an average time. The actual time varies depending upon the complexities of each claim.

Problems:

Determining that a dispute exists - delays in the return of security deposits.

The time taken to return a security deposit following termination, varies enormously. In some cases owners return the deposit on the day of vacation. In others returns are not made for weeks.

Any delay in the return of a security deposit has potential to create financial difficulties for a tenant. However, it also makes it difficult for the tenant to determine whether or not there is a dispute and therefore, whether or not to make an application to the Residential Tenancy Commissioner. This uncertainty often means that the time taken to determine the disbursement of the security deposit may extend to many weeks or indeed months.

A lack of knowledge about the service.

The Commissioner's process can work successfully, only if tenants know of its existence. It has been suggested that many tenants are not aware of the existence of the Commissioner and consequently do not make applications. This may mean that the level of disputation about security deposits is much higher than it currently appears. This is a particular concern if the security deposit is being retained for unreasonable or for frivolous reasons.

Discussion:

Greater clarity is needed so that the existence or otherwise of a dispute can be clearly established. There is no reason why tenants should be required to wait for the length of times that have been reported. Once a tenancy has ended and there is no damage or rent owing, the security deposit should be refunded immediately. If an agent needs to inspect the property, that should be done at a pre-arranged time on the day of vacation or at the very least on the business day following vacation. Once an inspection has occurred, payment should be made as soon as reasonably possible.

Where assessment of damage is required, further time may elapse before the final amount of repayment can be determined. In some cases significant work may need to occur before a matter is finalised. However, an owner should at least be able to provide an indication of the time that will elapse before the matter is finalised.

Options:

Establish a bond board

A bond board has often been proposed as a means of addressing all of these issues and in larger jurisdictions, economies of scale confer significant cost benefits from pooling and investing bond funds for the general benefit of the community. However, in Tasmania, the costs of administering such a scheme would outweigh the benefits and result in a net cost to Government compared with the existing arrangements.⁴

At present, security deposits lodged with the real estate industry contribute to the Auctioneers and Real Estate Agents Guarantee Fund. A part of these funds are directed toward the costs of administering the Act including the costs of the Commissioner. The collection and investment of this money utilises the existing infrastructure of real estate industry at no cost. Even if the funds available from the private property market were added to such a scheme, the costs of developing and funding a separate system would be prohibitive.

Strengthen the existing provisions

If we focus on the problems, it is possible to solve them by making amendments to the existing legislative regime. For example, it is possible to provide that security deposits must be returned within a specified period from the termination of a tenancy. Further, if the security deposit is not returned a notice should be given to the tenant giving reasons as to why the deposit has not being returned. Where damage is being assessed, the notice should give a date upon which such an assessment will be completed.

Where the full security deposit is not returned within the specified period, the owner should provide to the tenant a copy of an application form to the Commissioner.

⁴ The Office of Consumer Affairs and Fair Trading has conducted a feasibility analysis on establishing a bond board. Economies of scale and the low cost of rental compared with other states means that a bond board is not viable.

Options

1. Establish a bond board
2. Strengthen the existing provisions by requiring that the security deposit is either:
 - (1) returned on the next business day after vacation; or
 - (2) a notice is given
 - (i) detailing the amount of damage or loss and if applicable a date on which damage will be assessed; and
 - (ii) enclosing a copy of an application form to the Residential Tenancy Commissioner.

Issue Two: Pet Bonds

Problem:

During development of the Residential Tenancy Act, there was considerable discussion about bonds and in particular permitting bonds for particular reasons. One of the key issues is pet bonds. However, as it was difficult to establish clear rules for special bonds, it was decided that special bonds should not be permitted. Consequently, the Act limits bonds to not more than an equivalent of 4 weeks rental.⁵

Pets are a key issue for residential tenancies and dogs and cats are claimed to be a major contributor to damage in residential tenancies. The purpose of a security deposit is to provide a form of insurance against loss or damage incurred by the tenant. Many owners will argue that the bond is too small in many circumstances to cover the loss which might occur, particularly when combined with rental arrears. For this reason many owners will not allow tenants to keep pets.

⁵ Section 26.

It has been argued that some tenants are happy to pay an additional premium for permission to keep a pet. However, as the Act prohibits owners for charging more than 4 weeks as a security deposit, it is not possible for the parties to come to any mutually agreed arrangement. This has created disadvantage for a small group of people who would be happy to pay an additional amount to ensure that they were able to keep pets.

Discussion:

While making provision for some to keep pets is reasonable, the main problem is avoiding the imposition of unreasonable requirements on all pet owners. For example, it would be unreasonable for an owner to require a pet bond for goldfish or perhaps for one cat or for a small dog. However, it could be argued that it would be reasonable if the tenant wished to keep a number of cats in a small flat or indeed a large dog or a number of dogs. Generally, it could be argued that an additional charge should be made only where there was potential for the pet to cause damage to the property.

While the notion of potential for damage is reasonable, it might be problematic if each owner was able to determine the existence or non-existence of such potential. Clearly, some owners would always determine that such potential existed and would always charge the additional deposit.

Options:

Permit a two week pet bond

This would enable owners who are reluctant to allow a tenant to keep pets to obtain additional security. However, it may be difficult to ensure that exploitation does not occur where no significant risk arose. It would be undesirable for this mechanism to simply allow for a six weeks bond whenever a tenant wished to keep a pet of any type.

Do not impose a pet bond

If the current situation remains, the existing disadvantage for those people who wish to keep certain types of pets will continue.

<p>Options</p> <ol style="list-style-type: none">1. Permit a two week pet bond2. Do not impose a pet bond

5. Recommendations

1. *That the Act be amended to entitle a mortgagee who exercised rights of foreclosure under a mortgage to give a tenant notice to vacate after 28 days.*
2. *That any conflict between the Residential Tenancy Act and the Land Titles Act 1980, relating to the rights of mortgagees be resolved.*

See Amendment Bill - Recommendation 1 & 2
Page 17 clause 28, page 5 clause 5(g), page 4 clause 4(c), page 10 and 11 clauses 19(b) and clause 20.

3. *That the Act be amended to allow an owner to give 14 days notice to vacate so that it takes effect on the day of expiry of a fixed term agreement.*

See Amendment Bill
Page 10 clause 19(b).

4. *That section 57 be amended to give the court a discretion to order work to be performed if it is of a view that security is inadequate.*

See Amendment Bill
Page 14 clause 24.

5. *That where an owner requires entry for the reasons detailed in section 56(3), the parties should negotiate a mutually agreeable time. Where a mutually acceptable time cannot be agreed, the owner should advise the tenant of the intended time of entry.*

See Amendment Bill
Page 14 clause 23(c).

6. *That section 56 (5) be repealed.*

See Amendment Bill
Page 14 Clause 23

7. *That the Act be amended to provide for entry by an owner within one month of commencement of the tenancy to inspect the premises and every 3 months thereafter.*

See Amendment Bill
Page 14 clause 23(b)

8. *That the Office await the outcome of the current interdepartmental review of boarding and rooming houses and conduct a separate examination of caravans parks.*

No legislative change required at this time.

9. *That section 6 of the Act be amended to allow for the non-application of a part of the Act to prescribed premises or premises of a prescribed class.*

See Amendment Bill
Page 5 clause 5, page 16 clause 27.

10. *That the current exemption regulation for retirement villages be revised once the detail of retirement villages legislation is known.*

No legislative change required at this time.

11. *That section 17 of the Act be amended to make it illegal for any fees to be charged to any person for making an application to rent premises or for viewing a residential premises.*

See Amendment Bill
Page 5 clause 6

12. *That the Act be amended to provide that penalty clauses in residential tenancy agreements are void.*

See Amendment Bill
Page 15 clause 25

13. *That the Act be amended to allow a payment period to run from a fixed date in one month to a fixed date in another month by allowing a payment period of up to 31 days.*

See Amendment Bill
Page 6 Clause 7

14. *That the Act require an owner to mitigate any loss which arises from an action of a tenant.*

See Amendment Bill
Page 15 Clause 26

15. *That a definition of 'early termination' be included in the Act to mean:*

(a) *the termination of a fixed term agreement prior to the expiry date by:*

- *vacant possession being delivered to the owner by the tenant, following a notice to vacate, as a result of a failure of the tenant to comply with a condition of the agreement; or*
- *vacant possession being delivered to the owner by the tenant without a notice of termination being lawfully given to the owner or a notice to vacate being given to the tenant.*

(b) *termination of any agreement prior to the date upon which lawful notice by either the owner or the tenant takes effect.*

16. *That the Act be amended to provide that the maximum amount of loss that may be charged to the tenant for 'early termination' of a fixed term agreement be limited to:*

- *advertising;*
- *rent; and*
- *the pro-rata costs paid to agents of the owner for establishing an agreement with a new tenant.*

17. *That the maximum charges to be charged for 'early termination' be prescribed by regulation.*
18. *That the provisions relating to abandonment be revised to make it clear that abandonment can occur without the need for an order from the court.*

See Amendment Bill - Recommendations 15 to 18
Page 3, clause 4, Page 12 clause 22

19. *That the Act be amended to give the Commissioner a discretion to refuse to consider applications if not lodged within 30 days after the end of the tenancy.*

See Amendment Bill
Page 8 clauses 10 and 11

20. *That sections 17 and 25 of the Act be amended to allow a pet bond (except for dogs required to assist the vision or hearing impaired) to a value equivalent to 2 weeks rent for the premises.*

See Amendment Bill
Page 7 clause 9

21. *Amend the Act to prohibit the keeping of pets on residential premises without the permission of the owner.*

See Amendment Bill
Page 15 clause 26

22. *Amend the Act to make it clear that the court can order the performance of 'urgent' and 'emergency' maintenance as well as 'general' maintenance.*

See Amendment Bill
Page 9 clause 15

23. *That clause 39 (2) be amended to prevent its application (notice becomes void) where notice of termination is given for the non-performance of maintenance.*

See Amendment Bill
Page 10 Clause 17

24. *That the Act be amended to require that where arrangements are made by an owner to arrange for emergency and urgent repair, that the repairs be carried out as soon as practicable.*

See Amendment Bill
Page 9 Clause 14

25. *That section 24 of the Act be amended to extend the prohibition on distress for rent to distress for any reason.*

See Amendment Bill
Page 7 Clause 8

26. *That the Act be amended to make it clear that goods distrained must be returned at no charge to the lawful owner.*

See Amendment Bill
Page 7 Clause 8

27. *That the application of section 41 [order of termination] to co-tenants be clarified and the Act amended accordingly.*

See Amendment Bill
Page 10 Clause 18

28. *That the application of section 41 be extended to allow for the termination of a tenancy where injury has occurred or is likely to occur to a neighbouring occupant or damage has or is likely to occur to a neighbouring property.*

See Amendment Bill
Page 10 Clause 18

29. *That the Act be amended to remove doubt that the Small Claims Court can hear and determine any matter under sections 41 and 45 of the Residential Tenancy Act [vacant possession and termination] and make any orders specified in those sections.*

See Amendment Bill
Page 17 Clause 29

30. *That the Commissioner have a discretion to refund fees where it is clear that an application by a tenant or the actions of an owner in relation to a dispute about security deposits are vexatious.*

See Amendment Bill
Page 8 Clause 11

31. *That the Act be amended (in consultation with the courts) to more clearly define 'service' for the purposes of serving notices under the Act.*

See Amendment Bill
Page 3 Clause 4

32. *That the requirement that applications for orders be served on the tenant on the same day that they are made should be replaced with a requirement that they be served 'within 24 hours'.*

See Amendment Bill
Page 11 Clause 21

33. *That the Office conduct a public awareness campaign following the enactment of amendments to the Act and provide training for key groups within the market and within government.*

No legislative change required at this time.

Appendix 1 - Final Report Recommendations

34. *That the Office examine the collection and use of information by property managers and owners, to determine whether the provisions of the Privacy Act 1988 adequately meet the needs of the Tasmanian market and whether further protections or restrictions are required.*

No legislative change required at this time.

35. *That the Act be amended to allow a magistrate to delay hearing an application for an order for vacant possession until the correct time for expiration of a notice to vacate has elapsed.*

See Amendment Bill

Page 5 Clause 5

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